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No. 98554-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Welfare of:
G.J.A., A.R.A., S.S.A., J.J.A., and V.A.,
Minor Children

C.A. (Mother)
Petitioner.

On Appeal from the Superior Court of the State of Washington for
Spokane County
Cause Nos. 17-7-02029-2, 17-7-02030-6, 17-7-01031-4, 17-7-02032-2,
17-7-0233-1
The Hon. Commissioner Michelle Ressa

BRIEF OF AMICI CURIAE
WASHINGTON DEFENDER ASSOCIATION
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

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I. INTRODUCTION

“Active efforts” requires action through a proactive approach by the caseworker. *Matter of D.J.S.*, 12 Wn. App. 2d 1, 25, 456 P.3d 820 (2020) (citing *In re JL*, 483 Mich. 300, 321-22, 770 N.W.2d 853 (2009)). Failure to make active efforts extends intergenerational trauma and violates the Indian Child Welfare Act (ICWA) and the Washington Indian Child Welfare Act (WICWA). 25 U.S.C. § 1912(d); RCW 13.38.130(1).

Congress passed ICWA in 1978 in response to a disproportionately high rate of removal of Indigenous children from their traditional homes and cultures. *Matter of D.J.S.*, 12 Wn. App. at 25. Central to ICWA and WICWA is the active efforts requirement, not available to non-Indigenous families, designed to protect Indigenous families from further governmentally induced harm and to prevent “the breakup of the Indian family.” 25 U.S.C. § 1912(d); RCW 13.38.130(1). The paramount goal of child welfare legislation is to keep families intact whenever possible. This and should be a first considerations in all cases. RCW 13.34.020; *In re Dependency of K.N.J.*, 171 Wn.2d 568, 575, 257 P.3d 522 (2011).

A lack of active efforts perpetuates intergenerational trauma. Indigenous families and tribes of the United States face overrepresentation in the child welfare system, the lowest level of education, the highest level of poverty, and the lowest income of any racial or ethnic group. Brown-

Kathleen Brown-Rice, *Examining the Theory of Historical Trauma among Native Americans*, The Professional Counselor Volume 3, Issue 3, Pages 117–130 (2013). The failure of the Department Children Youth and Families' social workers to engage in active efforts results in further harm to Indian children and exasperates overrepresentation of Indigenous children in the foster care system.

Here, the trial court erred when it denied the Mother's Motion for a No Active Efforts Finding because the Department of Children, Youth, and Families (Department) failed to provide most basic assistance. DCYF did not facilitate visitation between the parents and their children, failed to assign a local social worker, and failed to provide timely referrals. Because ICWA and WICWA protected this Indigenous family, the active efforts requirement called for more than the Department provided, and the failure to abide by the requirement has caused harm to the children that this Court must correct.

II. IDENTITY OF AMICI

The Washington Defender Association (WDA) is a statewide organization whose membership is comprised of public defender agencies, indigent defenders, and those who are committed to seeing improvements in indigent defense. WDA representatives frequently testify before the Washington House and Senate on proposed legislation affecting Indigent

clients and their families. The Washington Court of Appeals and The Washington Supreme Court have granted WDA leave to file amicus briefs on many prior occasions. WDA represents 30 public defender agencies and has over 1,600 members, many of whom represent Indigent parents and children in child welfare proceedings and other areas of indigent defense.

The Fred T. Korematsu Center for Law and Equality (Korematsu Center) is based at Seattle University School of Law and advances justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the incarceration of over 120,000 Japanese Americans. He took his challenge to the military orders to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by “military necessity.” Mr. Korematsu went on to successfully reopen his case and clear his conviction and to champion the cause of civil liberties and civil rights for all people. The Korematsu Center, inspired by his example, works to advance his legacy by promoting social justice. The Korematsu Center has a special interest in ensuring that the government follow appropriate procedures in its treatment of Native children and Native families. These appropriate procedures must be responsive to the government’s earlier active role in destroying Native families. The

Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

III. STATEMENT OF THE CASE

Amici adopts and incorporates by reference the Procedural History and Statement of the Facts set forth by the Petitioner.

IV. ARGUMENT

1. The active efforts requirement protects Indigenous children and their families from the trauma of removal and reduces the disparate impact of the dependency system on Indigenous families

The backbone of ICWA and the WICWA is the requirement that the State engage in active efforts to reunify Indigenous families when the child welfare system interferes, leading to the removal of Indigenous children from their parents. 25 U.S.C. §1903(1)(i); RCW 13.38.040(3)(a). Lack of active efforts thwarts the central purpose of ICWA and WICWA-- to keep Indigenous children with their families. Lack of active efforts in this case has broken up an Indigenous family. 25 U.S.C. §1903(1); RCW 13.38.040(3); *Matter of Dependency of Z.J.G.*, 196 Wn.2d 152, 157, 471 P.3d 853 (2020).

Active efforts requirements are not defined by ICWA, but they are defined by WICWA.¹ Active efforts requirements are the “gold standard”

¹RCW 13.38.100(1) defined active efforts meaning the following:

(a) In any foster care placement or termination of parental rights proceeding of an Indian child under chapter 13.34 RCW and this chapter where the department or a supervising agency as defined in *RCW 74.13.020 has a statutory or contractual duty to provide services to, or procure services for, the parent or parents or Indian custodian, or is providing services to a parent or parents or Indian custodian pursuant to a disposition order entered pursuant to RCW 13.34.130, the department or supervising agency shall make timely and diligent efforts to provide or procure such services, including engaging the parent or parents or Indian custodian in reasonably available and culturally appropriate preventive, remedial, or rehabilitative services. This shall include those services offered by tribes and Indian organizations whenever possible. At a minimum "active efforts" shall include:

(i) In any dependency proceeding under chapter 13.34 RCW seeking out-of-home placement of an Indian child in which the department or supervising agency provided voluntary services to the parent, parents, or Indian custodian prior to filing the dependency petition, a showing to the court that the department or supervising agency social workers actively worked with the parent, parents, or Indian custodian to engage them in remedial services and rehabilitation programs to prevent the breakup of the family beyond simply providing referrals to such services.

(ii) In any dependency proceeding under chapter 13.34 RCW, in which the petitioner is seeking the continued out-of-home placement of an Indian child, the department or supervising agency must show to the court that it has actively worked with the parent, parents, or Indian custodian in accordance with existing court orders and the individual service plan to engage them in remedial services and rehabilitative programs to prevent the breakup of the family beyond simply providing referrals to such services.

(iii) In any termination of parental rights proceeding regarding an Indian child under chapter 13.34 RCW in which the department or supervising agency provided services to the parent, parents, or Indian custodian, a showing to the court that the department or supervising agency social workers actively worked with the parent, parents, or Indian custodian to engage them in remedial services and rehabilitation programs ordered by the court or identified in the department or supervising agency's individual service and safety plan beyond simply providing referrals to such services.

(b) In any foster care placement or termination of parental rights proceeding in which the petitioner does not otherwise have a statutory or contractual duty to directly provide services to, or procure services for, the parent or Indian custodian, "active efforts" means a documented, concerted, and good faith effort to facilitate the parent's or Indian custodian's receipt of and engagement in services capable of meeting the criteria set out in (a) of this subsection.

of services that further reunification. *Guidelines for Implementing the Indian Child Welfare Act*, p. 39, Department of Interior, Bureau of Indian Affairs (December 2016). Active efforts requirements call for a Department social worker to make affirmative, active, thorough and timely efforts towards maintaining or reuniting an Indigenous family. *Matter of Welfare of A.L.C.*, 8 Wn. App. 2d 864, 439 P.2d 694 (2019) (citing 25 C.F.R. § 23.2)). This requires the social worker to actively help the parents develop the skills necessary to keep custody of their children, not just to develop a plan. *Matter of D.J.S.*, 12 Wn. App. 2d at 31-32, 456 P.3d 820 (2020) (citing *In re Doe*, 157 Idaho 920, 342 P.3d at 637 (2015)). Referrals alone are insufficient to meet the active efforts requirement. *Id.*, 12 Wn. App. 2d at 29-30, 456 P.3d 820; RCW 13.38.040(1)(a)(iii). Examples of active efforts include the caseworker physically taking a parent to a housing network and mental health service center or ensuring the parent obtains transportation by leading the parent to a bus and sitting him inside. *Id.*, 12 Wn. App. 2d at 36-37, 456 P.3d 820. In other words, what normally is acceptable in non-Indigenous cases is not legally sufficient for Indigenous children and families.

The active efforts requirement provides a strong legal safeguard for Indigenous children and families. When the Department has not made active efforts, courts must hold the Department accountable. Failure to do

so undermines ICWA and WICWA's purpose of preventing intergenerational harm and disparate outcomes for Indigenous children and families.

A. The active efforts requirement is a safeguard intended to mitigate the traumatic experiences of Indigenous children in Washington State.

Intergenerational trauma is the foremost reason behind ICWA's active efforts requirement. *See Matter of Adoption of T.A.W.*, 186 Wn.2d 828, 841-42, 383 P.3d 492 (2016). The child welfare system was a common avenue for dismantling Native families, especially during the 1950s and 1960s, when the Indian Adoption Project placed Native children with white families.²

The impact of trauma on a community can be transmitted from parents to their offspring, just as knowledge and culture are shared through intergenerational transmissions.³ In communities subject to intergenerational trauma, members are more likely to encounter stressful experiences in adulthood, including poverty, unemployment, violence, homicide, assault, and witnessing traumatic events. *Id.*, at pg. 7.

² Indian Child Welfare Act, The Adoption History Project, University of Oregon, <https://pages.uoregon.edu/adoption/topics/ICWA.html> (accessed December 23, 2020)

³ Amy Bombay, et al, *Intergenerational Trauma: Convergence of Multiple Processes among First Nations peoples in Canada*, International Journal of Indigenous Health, 6–47. (2009).

This trauma is not unique to Indigenous communities in the United States. Indigenous people in both Canada and Australia have endured long periods of dislocation and government-sponsored child removal, which have dismantled family and cultural structures. Stephane M. Shepherd & Roberto Lewis-Fernandez, *Forensic Risk Assessment and Cultural Diversity: Contemporary Challenges and Future Directions*, 22 Psychol. Pub. Pol'y & L. 427 (2016). Likewise, this form of communal trauma is present in groups of people who have experienced genocide, such as Holocaust survivors and refugees fleeing war zones. Cindy C. Sangalang and Cindy Vang, *Intergenerational Trauma in Refugee Families: A Systematic Review*, J Immig. Minor Health, 745–754 (2017).

Congress recognized the intergenerational damage and maltreatment children and families of Tribes across the United States have experienced when it passed ICWA in 1978. Over the course of four years, Congress heard testimony about the devastating impact the removal of children had on Indigenous communities.⁴ Congress found the overrepresentation of Indigenous children in the foster care system was caused by child welfare workers' lack of understanding about the important

⁴ Matthew L.M. Fletcher, *The Origins of the Indian Child Welfare Act: A Survey of the Legislative History*, Michigan State University Indigenous Law & Policy Center Occasional Paper Series, 2009- 04 (April 10, 2009)).

role extended families serve in Indigenous culture and about the harm removal of Indigenous children from their families caused, threatening the very existence of Indigenous tribes. *D.J.S.*, 12 Wn. App. 2d at 25-26, 456 P.3d 820.

Congress heard testimony against the backdrop of a long violent and genocidal history between the Indigenous tribes of North America and white colonists, who later started the United States Government, including through forced assimilation.⁵ In an attempt to destroy Native American culture, the federal government sent Indigenous children, often by force, to day schools and boarding schools.⁶

Removal of children from Native families occurred in Washington, where there were 14 Indian Residential Schools. Laws of 2019, Resolution 8703.⁷ The government, supported by churches, removed Indigenous children from their homes and placed them in Indian Residential Schools in a misguided attempt to “civilize” them by eradicating their culture. *Id.* In

⁵ Kevin Heiner, Note, *Are You My Father? Adopting a Federal Standard for Acknowledging or Establishing Paternity in State Court ICWA Proceedings*, 117 Colum. L. Rev. 2151, 2154-55, (2017).

⁶ Ann Piccard, *Death by Boarding School: “The Last Acceptable Racism” and the United States’ Genocide of Native American*, 49 Gonz. L. Rev. 137, 151-52 (2013).

⁷ Full title of the Senate Resolution is, “*Remembering the surviving children of Indian Boarding Schools.*”

March 2020, the Washington State Senate recognized that use of these residential schools had caused extended suffering and trauma. The “... children observed and suffered physical, emotional, cultural, spiritual, psychological, and sexual abuse, and punishment by physical restraints, beatings, and isolation in inhospitable surroundings...” *Id.*

The risk of continuing harm is present in all ICWA and WICWA cases, especially when active efforts have not been met. This Court has found when active efforts has not been met such as exhausting all placement requirements contained in these laws, “the separation of these children from each other a further tragedy in this case and a continuation, not a remedy, to the state-sponsored breakup of the Indian family. *In re Dependency of A.L.K., L.R.C.K.-S., D.B.C.K.-S.*, No. 98487-5, p. 7-8 (Montoya-Lewis, J., concurring) (December 24, 2020).

The purpose of ICWA is to keep Indigenous children with their families. ICWA requires active efforts, placing great responsibilities on the social worker. Judge Leonard Edwards (ret), *Defining Active Efforts in the Indian Child Welfare Act*, The National Association of Counsel for Children, Vol 41, No. 01, pg. 8 (Jan/Feb 2019). This great responsibility of the State is based on recognition of the painful history tribal members experienced when they lost their children due to genocidal policies.

Anything less than active efforts fails to prevent further intergenerational trauma and increases the risks Indigenous children.

B. The Department’s failure to engage in active efforts increases disparate outcomes between Indigenous children and other children.

The need to protect Indigenous children and their families from removal of children to non-Native residences remains great. 42 years after the passing of ICWA, state child welfare systems are four times more likely to remove Indigenous children⁸ from their families than they are to remove other children. 13 states report overrepresentation of Indigenous children in their foster care system. *Id.* Finally, 56% of adoptions of Indigenous children happen outside their families and communities. *Id.* Washington State is no exception. Native children here are more likely to be ensnared in the child welfare system than white children. Washington State Department of Children, Youth & Families. *Washington State Child Welfare Racial Disparity Incident Report 5-10* (2019). The United Nations has said that “Indigenous children continue to be removed from their families by welfare agencies that equated poverty with neglect.” United

⁸ Defined as American Indian and Alaska Native children. *Setting the Record Straight: The Indian Child Welfare Act Fact Sheet*, National Indian Child Welfare Association (2018) available at <https://www.nicwa.org/wp-content/uploads/2018/10/Setting-the-Record-Straight-2018.pdf>.(accessed December 23, 2020).

Nations, *Committee on the Rights of the Child holds a day of discussion on the rights of Indigenous children* (2003).

Many of the effects of intergenerational trauma directly link to poverty and the high rate of Indigenous children the State removes from their families. Child welfare courts are growing more cognizant that removal of children from their parents is profoundly traumatic. Christian M. Connell et al., *Changes in Placement among Children in Foster Care: A Longitudinal Study of Child and Case Influences*, 80 (3) Soc. Serv. Rev. 398-418 (2006). This requires the Department to encourage cultural competency on the part of its employees. Without the robust protection of the active efforts requirement, these trends will continue.

Without the protection of the active efforts requirement, the five children of the Mother have experienced the family separation ICWA and WICWA are supposed to prevent.

V. CONCLUSION

The Superior Court's refusal to find the Department failed to engage in active efforts violates ICWA and WICWA and extends the intergenerational trauma of Indigenous communities and families in Washington State. For this reason, amici respectfully recommends that the Supreme Court reverse the lower court.

DATED this 28th day of December 2020.

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